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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. [redacted]9 12

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC MANUFACTURING
COMPANY, a corporation, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM FISHER,
Counsel for Respondents.

W. H. WATSON,
S. PASCO,
Of Counsel.

SUBJECT INDEX

ARGUMENT

Petitioner's Point A 1
Petitioner's Point B 3
Petitioner's Point C 5

AUTHORITIES

Alfred Richards Brick Co., vs Rothwell 18 App. D. C. 516 ... 2
American Surety Co., vs Finletter 274 Fed. 152 ... 2
American Surety Co., vs National Bank 17 Fed. 2nd, 942 ... 3
Belknap Hardware Co., vs Ohio River Co., 271 Fed. 144 ... 1, 5
Corpus Juris Vol. 50, Page 257 ... 4
Cox vs New England Equitable Ins. Co. 247 Fed. 955 ... 1
Exchange State Bank vs Federal Surety Co., 28 Fed 2nd, 485 ... 2, 3
Fouts vs Maryland Casualty Co., 30 Fed. 2nd, 357 ... 4
Glades County Bank vs Detroit Fidelity & Surety Co., 57 Fed. 2nd, 449 ... 2
Hardaway vs National Surety Co., 211 U. S. 552 ... 3, 5
Henningsen vs U. S. Fidelity & Guaranty Co., 208 U. S. 404 ... 2, 5
Jenkins vs National Surety Co., 277 U. S. 258 ... 3, 4
Maryland Casualty Co., vs Fouts 11 Fed. 2nd, 71 ... 3
In Re: P. McGarry & Son 240 Fed. 400 ... 1
National Surety Co., vs County Board 15 Fed. 2nd, 993 ... 3
Peoples vs Peoples Brothers 254 Fed. 489 ... 2
Pou vs South Carolina Warehouse Co., 27 Fed. 2nd, 418 ... 3
Prairie State Bank vs United States 164 U. S. 227 ... 4
Robertson vs Blaylock 135 S. E, 136 ... 3
In Re: Scofield 215 Fed. 45 ... 1
Springfield vs American Surety Co., 7 Fed. 2nd, 44 ... 4
United States vs National Surety Co., 254 U. S. 73 ... 3
U. S. F. & G. Co., vs Woolridge 268 U. S. 234 ... 4

SUPREME COURT OF THE UNITED STATES

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No. 819

AMERICAN SURETY COMPANY OF NEW YORK,
a corporation,
Petitioner and Appellant Below,

vs.

WESTINGHOUSE ELECTRIC MANUFACTURING COMPANY, a corporation, et al.,
Respondents and Appellees Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Petitioner's Point A

Conflicts between Circuit Courts of Appeals on the superior equity of unpaid labor and material claimants.

Recognition of the equitable rights of unpaid laborers and materialmen to funds representing balances due contractors on public contracts, the Government having been fully satisfied by performance, has been accorded generally by the Federal Courts.

In Re P. McGarry & Son (7th Cir.) 240 Fed. 400
Cox vs New England Equitable Ins. Co., (8th Cir.) 247 Fed. 955
Belknap Hardware Co., vs Ohio River Co., (6th Cir.) 271 Fed. 144
In Re Scofield (2nd Cir.) 215 Fed. 45

Alfred Richards Brick Co., vs Rothwell 18 App. D. C. 516

Exchange State Bank vs Federal Surety Co., (8th Cir.) 28 Fed. 2nd., 485

Glades County Bank vs Detroit Fidelity & Surety Co., (5th Cir.) 57 Fed. 2nd., 449

In some of the cases the special equity was decreed to be in the surety by reason of its having paid all of the material and labor claims, the surety's rights being derived from the rights of the laborers and material men whom it had paid. In Exchange State Bank vs Federal Surety Co., (8th Cir.) 28 Fed. 2nd., 458 the contest between the Surety and a bank, as assignee of the contractor, was decided in favor of the Surety. But the contest between the Surety and the bank as assignee of $5793.33 of labor and material claims was decided in favor of the Bank.

The only case claimed by petitioner to conflict with the principle of the other cases is American Surety Company vs Finletter (3rd Cir.) 274 Fed. 152, which involved a City contract in Pennsylvania. The opinion of the Finletter case may well need clarifying, since the Court's ultimate conclusion is not entirely clear, although petitioner construes it as favorable to its contention in the instant case. The United States has always recognized its "equitable obligations to see that the laborers and supply men were paid in connection with its public work contracts." (Henningsen vs United States Fidelity & Guaranty Co., 208 U. S. 404). And we think that the Finletter case, passing upon a City contract in Pennsylvania does not offer such a conflict with the decisions of other Federal Courts on the rights of furnishers of labor and material to the United States, as to call for the action of this Court upon the question.

The origin of the Finletter case is the case of Peoples vs Peoples Brothers 254 Fed. 489, which is apparently the title of the same case in the District Court. The Peoples case held that the surety "on completion of the contract by a Receiver, was not entitled by subrogation to the amount due thereon until claims for labor and materials were paid

in full." The Peoples case has been cited with approval in the following cases:

Maryland Casualty Co., vs Fouts (4th Cir.) 11 Fed. 2nd., 71

American Surety Co., vs National Bank (E. D. Oh.) 17 Fed. 2nd. 942

Pou vs South Carolina Warehouse Co., (E. D. S. Car.) 27 Fed. 2nd. 418

United States vs National Surety Co., 254 U. S. 73

Jenkins vs National Surety Co., 277 U. S. 258

It is submitted therefore that the principle involved in this point is not so unsettled as to require this Court to consider and pass upon the question.

Petitioner's Point B

Conflict between Circuit Courts of Appeals on the effect of the surety's indemnity contract with the contractor, as giving it rights superior to those it acquires by subrogation.

The petitioner says two cases, in addition to the Finletter case, are in conflict with the decision in the instant case. They are:

(1) Exchange State Bank vs Federal Surety Company, (8th Cir.) 28 Fed. 2nd., 485 which was a contest between a surety on the one hand, and a bank assignee on the other hand. It was not a conflict between a surety and labor and material claimants. The decision was governed by Hardaway vs National Surety Company 211 U. S. 552. There is no confusion in the cases on the question that a surety's rights to reimbursement are superior to those of an assignee of the contractor.

(2) National Surety Company vs County Board (4th Cir.) 15 Fed. 2nd., 993. This case, we think, contains no conflict in principle. In the first place, it is concerned solely with North Carolina law in connection with a North Carolina contract. The North Carolina Court has specifically (Robinson vs Blaylock 135 SE 136) refused to recog-

nize the equitable lien principle which the Federal cases, cited under Point A, have applied. In the second place, the labor and material claims involved had not been filed in the one suit on the contractor's bond which had been brought, pursuant to the North Carolina Statute, and in which the Statute provided all claimants should be made parties. In the third place, the Surety had completed the contract, upon the contractor's default and thereupon, as in Prairie State Bank vs United States 164 U. S. 227, became subrogated to the rights of the Public Authority, the obligee in the bond so far as the performance of the work was concerned. In the instant case, the Government was satisfied by complete performance by the contractor.

So far as the rights of the Gevernment, as the bond obligee for performance, and of the laborers and materialmen, as the bond obligees for payment of their bills, are concerned, the principle that the contractor's indemnity agreement with the surety adds nothing to the rights which the surety obtains by operation of law, is one about which there is no uncertainty of decision.

U. S. F. & G. Co., vs Woolridge 268 U. S. 234

Jenkins vs National Surety Co., 277 U .S. 258

Springfield vs American Surety Co., (6th Cir) 7 Fed. 2nd., 44

(expressly approved in Jenkins vs National Surety Company)

Fouts vs Maryland Casualty Co., (4th Cir.) 30 Fed. 2nd., 357

In fact, it is a general and well recognized rule of law that

> "In view of the implied obligation of the principal to indemnify or reimburse the surety an express agreement therefor adds nothing to the surety's rights."
>
> 50 Corpus Juris 257

The indemnity agreement amounts to nothing more than a basis for conventional subrogation. And, disassociated with the surety's rights as surety, would give it no better

right than the bank got as assignee in Henningsen vs U. S. F. & G. Co., 208 U. S. 404, or than Hardaway got in Hardaway vs National Surety Co., 211 U. S. 552.

We submit, therefore, that the opinion in the instant case on this point needs no clarification or confirmation by this Court.

Petitioner's Point C.

Conflict between the Court below and the Supreme Court's decision in Henningsen vs U. S. Fidelity and Guaranty Co., 208 U. S. 404.

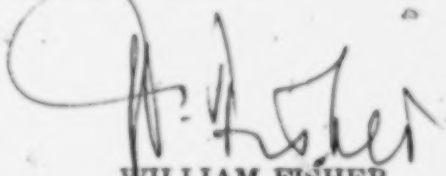
Petitioner urges that the Court below followed Belknap Hardware Co., vs Ohio River Co., (6th Cir.) 271 Fed. 144, in an erroneous construction of the opinion in the Henningsen case. And states the error to lie in the fact that this Court in the Henningsen case determined that the laborers and material men had no rights to which the surety, paying all labor and material claims, could be subrogated; but that the subrogation of the surety necessarily had to be to the rights of the United States.

We submit that petitioner's theory of the Henningsen opinion is incorrect. The opinion, in its second paragraph, recognizes the possibility of subrogation to the rights of laborers and materialmen. It nowhere states to whose rights the surety was subrogated. It does say that the surety "paid the laborers and material men and thus released the contractor from his obligations to them, **and to the same extent released the Government from all equitable obligations to see that the laborers and materialmen were paid.**"

In the instant case the surety has not taken care of all of the equitable obligations resting on the Government, since it has not paid all labor and material claims. And the instant case involves the rights of unpaid labor and material claimants.

The Court below in recognizing the unsatisfied equitable rights of the laborers and materialmen was, we submit, thoroughly in accord with the holding of this Court in the Henningsen case.

Respectfully submitted,



WILLIAM FISHER,
Counsel for Respondents.

W. H. WATSON,
S. PASCO,
Of Counsel.